

TENNESSEE REGULATORY AUTHORITY

Sara Kyle, Chairman
Deborah Taylor Tate, Director
Pat Miller, Director
Ron Jones, Director



460 James Robertson Parkway
Nashville, Tennessee 37243-0505

NOTICE OF BRIEFING SCHEDULE

DOCKET: 02-00890

IN RE: Petition of US LEC Tennessee, Inc. for Declaratory Order

DATE: February 7, 2003

On August 28, 2002, US LEC Tennessee, Inc. ("US LEC") commenced this action by filing the *Petition for Declaratory Order*. The Petition asserts that US LEC entered into a contract to provide long distance telecommunications service to Airstream Wireless Services, Inc. ("Airstream"), but terminated such services based upon the following language contained in a tariff US LEC filed at the Tennessee Regulatory Authority ("Authority" or "TRA") on January 6, 1998:

In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.

US LEC's Petition requests the TRA to: (1) interpret the above quoted language authorizing termination of service in US LEC's tariff; and (2) find that US LEC properly terminated service to Airstream based on such tariff provision. The Petition further asserts that Airstream filed an action in the Chancery Court of Shelby County on July 30, 2002, and obtained an *ex parte* temporary restraining order requiring US LEC to restore long distance telecommunications service to Airstream. US LEC purportedly responded with a filing styled *Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss*. It is undisputed that US LEC did not restore service to Airstream.

On September 18, 2002, US LEC amended its Petition, alleging that Airstream no longer seeks resumption of service, but was pursuing an action for damages. US LEC maintains that upon a joint request by both parties, the Chancery Court stayed proceedings in the lawsuit before it pending the Authority's ruling on the issues raised in US LEC's Petition and amendments thereto.

On September 23, 2002, Airstream filed the *Response of Airstream Wireless, Inc. to US LEC of Tennessee, Inc.'s Petition for Declaratory Order*, arguing that the TRA lacks jurisdiction over the subject matter of this dispute. The Response contends that this dispute does not arise out of the Tennessee Telecommunications Act or require an

interpretation of US LEC's tariff. Airstream argues that the gravamen of US LEC's petition is fraud, particularly fraudulent inducement to contract, a matter over which the Chancery Court has jurisdiction. Airstream requests the TRA to: (1) deny US LEC's Petition; (2) issue an order stating that the TRA lacks jurisdiction over this matter; or, alternatively, (3) issue an order stating that US LEC improperly terminated its service to Airstream on July 24, 2002.

At the regularly scheduled Authority Conference held on October 21, 2002, the panel assigned to this case unanimously voted to convene a contested case and appointed General Counsel or his designee to act as Pre-Hearing Officer to prepare the case for a determination on whether the Authority has jurisdiction over this action and, if necessary, to hear preliminary matters prior to a Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion.

Consistent with the Directors' decisions, the Pre-Hearing Officer will prepare the jurisdictional issue for consideration as follows:

Airstream is hereby directed to file no later than **Tuesday, February 18, 2003** a brief with legal support on the jurisdictional issue raised as an affirmative defense in its Response. At a minimum, the brief shall address:

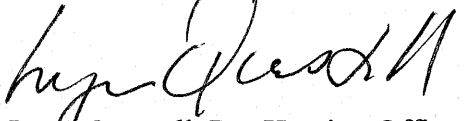
- The TRA's jurisdictional authority over this dispute under Tenn. Code Ann. §§ 65-4-103, 65-4-104, 65-4-106, 65-4-117(1) and (3) and 65-5-210(a).
- Whether the TRA has jurisdiction to interpret the parties' Customer Service Agreement.
- Whether Airstream is a public utility within the meaning of Tenn. Code Ann. § 65-4-101(a).
- Whether Airstream is purchasing intrastate access service from US LEC.

Airstream shall attach to the brief all pleadings from the lawsuit relating to this matter filed in Shelby County Chancery Court.

US LEC is directed to file a response to Airstream's brief no later than **Friday, February 28, 2003**.

All filings shall be served by hand-delivery, facsimile or e-mail on the date of filing.

FOR THE TENNESSEE REGULATORY AUTHORITY:


Lynn Questell, Pre-Hearing Officer

cc: Parties of Record
(original in docket file)